IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.434 OF 2004

V/O "Tyazhpromexport" ... Petitioner.

vs.

Mukand Limited. ... Respondent.

Mr.P.K.Samadhani i/b. Mustafa Motiwala, for Petitioner.

Mr.Ravi Kadam with B.B.Saraf, Amol Barve i/b. M/s.Udwadia & Udeshi, for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 14th June,2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the sole Arbitrator directing the Petitioner to pay to the Respondent the sum that is mentioned in the operative part of the award.

2. The facts that are material and relevant for deciding this petition are that the Petitioner had entered into a contract of sale with the Respondent for supply of the quantity mentioned in the contract of Low Ash Metallurgical Coke at the price stated In the contract. Admittedly, part of the agreed quantity was supplied by the Petitioner to the Respondent, but admittedly the Petitioner did not supply the entire agreed quantity. On failure of the Petitioner to supply the entire agreed quantity, the goods were purchased by the Respondent from other party. Admittedly, this purchase was made by the Respondent at a rate higher than the rate at which the Petitioner had agreed to supply the material to the Respondent. While the material was in the

process of being supplied to the Respondent , the Respondent sold the material to a third party on high seas sale. Admitted position is that in this transaction the Respondent has made a profit. The claim of the Respondent in the arbitration was for damages against the Defendant for committing breach of the contract by not supplying the agreed quantity of Coke. The principal defence of the Petitioner was that though the Petitioner failed to supply the entire agreed quantity of coke to the Respondent, as a result the Respondent was required to purchase the material from third party, the material purchased by the Respondent from the third party was sold by the Respondent at a profit and therefore it has not actually suffered any loss because of the breach of contract committed by the Petitioner. The arbitrator by the award found that the defence raised by the Petitioner has no substance and that the Respondent is entitled to the damages.

3. It is submitted by the learned counsel appearing for the Petitioner by referring to the provisions of Section 73 of the Act that when because of the failure of the Petitioner to supply the agreed quantity to the Respondent, the Respondent made the purchases, he was under a duty to mitigate the loss

suffered by him because of the breach of the contract committed by the Petitioner. It is submitted that such a step was taken by the Respondent when he sold the coke purchased by him and as a result of that sell, in fact the Respondent did not suffer any loss. In short, it is submitted by the learned Counsel appearing for the Petitioner that because of the failure of the Petitioner to supply the agreed quantity to the Respondent, the Respondent has not actually suffered any loss and therefore the Respondent is not entitled to claim any damages from the Petitioner.

4. On the other hand, on behalf of the Respondent it is submitted that the transaction between the Respondent and the third party for sale of the coke, purchased by the Respondent from the third party, because of the failure of the Petitioner to supply that quantity is not at all relevant for deciding the entitlement of the Respondent to claim damages from the Petitioner for committing breach of the contract. It is submitted that the only aspect that is relevant would be whether in making the purchases from third party of the material which was required to be purchased by the Respondent because of the breach of

contract committed by the Petitioner, the Respondent has suffered a loss . In the sense that he was required to pay higher price than the one which was agreed upon between the Petitioner and the Respondent in the contract.

5. The matter was argued at length by the learned Counsel appearing for both sides. During the course of their arguments they invited my attention to several judgments of the English Courts. Perusal of the award shows that the learned arbitrator has relied on a judgment of the Privy Council in the case of Erroll Mackay V. Maharaja Dhiraj Kameshwar Singh, AIR 1932 Privy Council 196 to hold that for the purpose of deciding whether the Respondent is entitled to damages what is relevant is whether he has suffered any loss in making purchases of the quantity which he was required to purchase because of the failure of the Petitioner to supply the agreed quantity and the fact that while disposing of that quantity which was acquired by the Respondent from the third party, he has made a profit is not relevant. The learned Arbitrator has relied on following observations from the judgment of the Privy Council:-

> If there was an available market for the goods at the date of breach the damages must be based on the difference between that market price and the contract price: a contract of resale becomes immaterial, because if there was a market, the law presumes that the buyer can minimize his damages by procuring substituted goods in the market, so that he is thus in the same position, apart from the difference in price, as if the seller had not made default. Hence the difference of price, if the market price exceeds the contract price, is the sole damage in general recoverable.

6. According to Privy Council, damages for breach of the contract for supply of goods are to be calculated on the date on which the contract has been breached and the measure of damages is the difference between the price of the goods prevailing on the market on that date and the price of the goods quoted in the contract. Thus, it is clear that for the purpose of finding out whether damages

are payable or not what is to be seen is whether the price of the goods in the market on the date of breach was higher than the price of the goods agreed in the contract. Perusal of the judgment of the Supreme Court in the case of M/s. Murlidhar Chiranjilal v/s. M/s.Harishchandra Dwarkadas and anr, AIR 1962 SC 366, shows that the same view has been taken by the Supreme Court also. The relevant observations of the Supreme Court are found in paragraph 9 of the judgment. It reads as under:-

> (9)The two principles on which damages in such cases are calculated are well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his

neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited V. Underground Electric Ry. Co. of London, (1912) AC 673 at p.689. These two principles also follow from the law as laid down in S.73 read with the Explanation thereof. If therefore, the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore, it would obviously be not entitled to any damages at

all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

7. Perusal of the above observations shows that the Supreme Court has held that even if the actual purchase of the goods was not made at Kanpur, even then if the rate prevailing on the date of the breach at Kanpur had been proved to be more than the rate mentioned in the contract then the damages could have been awarded comparing that rate with the rate agreed in the contract.

8. On the basis of the above referred two judgments, one of the Privy Council and other of the Supreme Court, in my opinion, it appears to be the law on the point that when there is a contract between the parties for supply of goods and that contract is breached then a claim for damages is made, the relevant date for computing the amount of damages is the date of the breach of the contract and for the purpose of working out the amount of damages what is to be seen is the prevailing market price of the goods on the date of the breach, and

that price is to be compared with the price of the goods agreed in the contract and if the market price is higher than the contractual price, damages are to be awarded accordingly. The duty to mitigate the damages can be taken as complied with if the purchase is made at a rate which was prevalent in the market on the date of the breach. For the purpose of finding out the entitlement for damages the inquiry will stop on the date of the breach of the contract. Further inquiry as to what is done with the goods that were purchased from the market is not required to be made and is also not relevant. Because as the Supreme Court has held, for being entitled to damages, it is not necessary that actual purchases should be made. The Supreme Court has clearly held that in such a situation where the party claiming damages did not even make the purchase of the goods in the market on the date of the breach, he would be entitled to damages, if he proves that the market price of the goods on the date of the breach was higher than the price agreed upon between the parties in the contract. It, thus, follows that the goods that were purchased were subsequently sold at a profit will not be the relevant fact for the purpose of deciding the entitlement of the party who suffered because of the

breach of contract. Thus, I find that the view that has been taken by the learned Arbitrator is a view which is in accordance with law existing on the point and therefore, I see no reason to disturb the same.

9. The petitioner has also made grievance about awarding of interest at the rate of 18% per annum on the awarded amount from the date of Award. It is submitted that awarding of rate of interest at 18% per annum is unreasonable. On behalf of the petitioner reliance is placed on the judgment of the learned Single Judge of this Court in the case Union of India Vs. Arctic(India), 2005(1) Bom.C.R. 505. Perusal of the provisions of the Act shows that power has been conferred on the Arbitrator to award interest on the awarded amount. If the Arbitrator does not award interest then interest at the rate of 18% per annum is deemed to have been awarded. This appears to be the provision made by the legislature so that the person against whom the Award has been made, makes payment immediately to avoid high rate of interest. However, it is true that if the interest at the rate of 18% per annum is to be awarded, time should be given to the person against whom the award is made to make payment immediately,

and if the payment is not made within that period, high rate of interest at the rate of 18% per annum can be awarded.

10. In the result, therefore, the petition succeeds in part. The award is modified only to the following extent:-

"On the awarded amount, the interest shall be paid at the rate of 6% per annum from the date of Award till realisation., in case the awarded amount with interest is paid by the petitioner to the respondent within a period of six weeks from today. If the awarded amount is not paid within the aforesaid period, interest at the rate of 18% per annum from the date of Award till the date of realisation shall be recoverable."

Rest of the award shall remain undisturbed. The petitioner shall pay cost of this petition to the respondent as incurred by the respondent.